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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

ROBERT C. KRUTZ,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Ohio Supreme Court

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QUESTIONS PRESENTED

Is a Defendant denied his due process right to a fair trial, if the court refuses to apply the unequivocal standards of a state legislative enactment, that mandates the consolidation of multiple offenses into one when a series of theft offenses are alleged to have been committed by one who is alleged to have committed the offenses in his same employment, capacity, or relationship to another, thereby obligating defendant to incur the risk of prejudice, as well as, the additional cost associated with defending forty-nine (49) counts rather than one (1).

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No.

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ROBERT C. KRUTZ,
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vs.

STATE OF OHIO,
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PETITION FOR A WRIT OF CERTIORARI
To the Ohio Supreme Court

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States.

The Petitioner, Robert C. Krutz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio entered in this proceeding on December 19, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio dated December 19, 1986 is reported as *State v. Krutz,* 28 Ohio St. 3d 36 (1986) and appears in the appendix hereto at page A1.

The opinion of the Court of Appeals, Eleventh Appellate District of Ohio, is unreported, and appears in the Appendix hereto at page A7.

JURISDICTION

The judgment of the Ohio Supreme Court was entered December 19, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED
United States Constitution, Amendment XIV, Section I

"No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was the Administrator and Chief Executive Officer of Robinson Memorial Hospital in Ravenna, Ohio, during all times relevant. He was issued a VISA card by authority of the chairman of the hospital's Board of Trustees, which he used for a variety of purposes. The use of the card was only limited by Defendant's discretion. It should be remembered that this case has not yet been tried and therefore, most facts are still in unresolved dispute.

The record does establish that on April 17, 1984 Robert Krutz was indicted by the Portage County Grand Jury on 49 counts, each charging violations of O.R.C. Section 2921.41(A)(1), theft in office. On April 17, 1984, Petitioner entered pleas of not guilty.

Thereafter, on the 23rd day of April, 1984, Mr. Krutz filed a written request for Bill of Particulars, seeking among other matters the specific offense Defendant is alleged to have committed as well as the conduct that formed the basis for the offenses charged. The State of Ohio, after months of delay, was ordered by the trial court to comply with Defendant's discovery requests, as well as the Motion for Bill of Particulars, by July 9, 1984. On that date the State of Ohio filed its Bill of Particulars stating that Defendant committed criminal offenses by writing checks, drawn upon a specific account of Robinson Memorial Hospital, in his capacity as hospital administrator.

On July 12, 1984, Petitioner filed a Motion to Dismiss urging the trial court to order that the several counts of the indictment be prosecuted as one (1) offense, not forty-nine (49), as directed by the provisions of Section 2913.61(C), Revised Code of Ohio. The motion was granted on August 29, 1984.

The State of Ohio filed a Notice of Appeal from this judgment on September 4, 1984. The Court of Appeals of the Eleventh District of Ohio affirmed the trial court's judgment on November 25, 1985.

The State of Ohio filed a second appeal in the Supreme Court of the State on December 23, 1985 which resulted in a reversal filed December 19, 1986.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONAL DEPRIVATION INCIDENT TO A COURT'S ORDER REFUSING TO APPLY THE UNEQUIVOCAL STANDARDS OF A STATE LEGISLATIVE ENACTMENT THAT MANDATES THE CONSOLIDATION OF MULTIPLE OFFENSES INTO ONE WHEN A SERIES OF THEFT OFFENSES ARE ALLEGED TO HAVE BEEN COMMITTED BY ONE WHO IS ALLEGED TO HAVE COMMITTED THE OFFENSES IN HIS SAME EMPLOYMENT, CAPACITY, OR RELATIONSHIP TO ANOTHER, ESPECIALLY SINCE THERE EXISTS A SUBSTANTIAL RISK OF PREJUDICE AND ADDITIONAL COSTS WHEN ONE MUST DEFEND AGAINST FORTY-NINE (49) COUNTS RATHER THAN ONE (1).

Robert C. Krutz was the chief executive officer of Robinson Memorial Hospital, carrying the title of Hospital Administrator. Krutz was issued a VISA card by the Hospital Board of Trustees. The parties are in conflict as to what was, and what was not, an authorized charge, but since the case has not been tried most issues of fact remain unresolved.

In any event, when the monthly VISA statements were received by the hospital administrator, they were paid by the issuance of a check, drawn on the hospital account entitled the "Special Purpose Fund".

Each time a check was issued, to pay a VISA statement which contained any item the prosecution considered improper, a separate crime was charged. Thus, an indict-

ment containing forty-nine (49) counts. It is, therefore, not surprising that each count of the indictment charges the same violation, i.e. Section 2921.41(A)(1), Revised Code of Ohio, in nearly identical language.

1. Robert C. Krutz did
2. On or about the (*date*),
3. At the County of Portage
4. Being a public official
5. Use his office in aid of committing a theft offense, to-wit:
6. The theft of monies belonging to Robinson Memorial Hospital
7. By writing check number (*number*) drawn on the Robinson Memorial Hospital Special Purpose Fund,
8. For (*item(s) purchased*).

Only three distinctions appear in the wording of the respective counts, i.e., the date of the offense, the check number and the item(s) purchased.

If one reads the indictment and bill of particulars in concert, one single sentence can summarize the theory of the prosecution's charges, i.e., Robert Krutz, as hospital administrator is a public official, who used his office between October 14, 1981 (Count 34) and May 5, 1983 (Count 19) to commit a series of theft offenses under Section 2913.02, which was the act of issuing checks from a hospital checking account known as the Special Purpose Fund to pay for certain enumerated items.

It is now appropriate to review the language of Section 2913.61(C), Revised Code of Ohio, to determine its meaning and applicability to the instant facts and charges.

> "When a series of offenses under Section 2913.02 of the Revised Code is committed by the offender in his same employment, capacity, or relationship to another, all such offenses shall be tried as a single offense . . . In prosecuting a single offense under this division, it is not necessary to separately allege and prove each offense in the series. It is sufficient to allege and prove that the offender, within a given span of time, committed one more theft offense in his same employment, capacity, or relationship to another."

The language of the Section is clear and unambiguous, and properly served as authority for the Trial Court's ruling as affirmed by the Court of Appeals, i.e., consolidating the forty-nine (49) counts into one (1). The prosecution concedes that Defendant always occupied the same employment, capacity and relationship and argues that each time a VISA payment was made from the Special Purpose Fund, "the Defendant committed a separate and distinct act of thievery". Such language is the obvious equivalent of arguing that each payment was a separate offense, the precise circumstance that triggers the application of the section, i.e., "when a series of offenses . . . is committed . . . all such offenses shall be tried as a single offense."

The legislative committee comments further support the lower court's rulings:

> "Under the new code, embezzlement is not defined as a separate offense, but is a series of theft offenses committed by an offender within a given span of time in his same employment, capacity, or relationship to another. Although each of these cases may technically involve a series of separate theft offenses, each is prosecuted under the rule of this section as a single

> offense, and the value for purposes of determining the degree of the offenses is the total value of the property or services involved in the series."

The former statutory offense of embezzlement was consistently defined as the intentional conversion by the embezzler for his own use of property entrusted to him. *State v. Kearns,* 102 Ohio App. 381, *aff'd* 165 Ohio St. 573. Once again this is the precise conduct alleged by the prosecution that the Defendant intentionally converted hospital money entrusted to him as administrator. As explained by the committee comments, each such conversion, although technically a separate theft, "is prosecuted under the rule of this section as a single offense."

The State has advanced four (4) basic objections to the application of Section 2913.61(C), Revised Code of Ohio, to the instant case. Each objection shall be considered independently to demonstrate its lack of merit.

FIRST, it contends that Section 2913.61(C) does not apply to indictments charging Theft in Office, because that offense is defined under Section 2921.41. The state reasons that Section 2913.61(C) applies only to prosecutions under Section 2913.02 because of the following language:

> "(C) When a series of offenses *under Section 2913.02* of the Revised Code is committed by the offender in his same employment, capacity, or relationship to another all such offenses shall be tried as a single offense . . ."

Their rationale continues with the observation that the section "does not apply where the offenses charged are under any statute other than Revised Code *Section 2913.02*".

The obvious problem with the prosecution's argument is best illustrated by a precise reading of the statutory lan-

guage. Section 2913.61(C), Revised Code applies when a series of offenses under *2913.02* is *committed,* not when they are *charged.* The state does not address this important distinction. Although they argue for precision, i.e., if the legislature intended to include other than offenses under *2913.02* they would have so stated, they make no effort to explain why the legislature would have used the word *committed* if they intended to restrict the operation of the statute to offenses that are *charged.*

It is clear that the two words have entirely separate and distinct meanings. WEBSTER'S NEW WORLD DICTIONARY defines the word "commit" as "to do or perpetrate, as an offense of crime." The word "charge" has traditionally referred to the formal complaint, indictment or information. See for example, Criminal Rule 5(A)(1), Criminal Rule 10(A). It is a fair and necessary presumption that the state legislature understands and intends the language used in its statutes. *Schario v. State,* 105 Ohio St. 535; *Wiesenthal v. Wickersham,* 64 Ohio App. 124. Given these definitions, and the additional fact that words such as "committed" shall be given their common meaning, while more technical words such as "charge" are construed technically, Section 1.42, Revised Code of Ohio, a logical conclusion can be reached, i.e., the legislature did not intend to restrict the application of Section 2913.61(C) to cases in which the Defendant is "charged" with a violation of Section 2913.02. Accordingly, the state's first objection is without merit.

SECOND, the government contends that because Section 2913.61(C) bears the title "value of stolen property" the legislature did not intend that the section apply to cases such as this presented. The argument continues

with the bold assertion that the section only applies when the question of value is important.

This is a most peculiar and contradictory argument since the prosecution also contends that the section only applies to charges under Section 2913.02 which itself contains several subsections in which value is not an element. For example, theft is a felony, irrespective of value:

> "(B) . . . if the property stolen is any of the property listed in *Section 2913.71* . . . or if the offender has previously been convicted of a theft offense . . . if the property stolen is a motor vehicle . . . or the proceeds of a motor vehicle insurance policy . . ."

This penalty provisions of Section 2913.02, provides a persuasive argument against the State's position that Section 2913.61(C) only applies when value is an issue. Does the state really believe that Section 2913.61(C) applies to one who commits a series of offenses under Section 2913.02 only if the Defendant has no previous theft convictions? If the section only applies when value is an issue such would be the absurd result.

It should also be observed that the title of a legislative enactment may not be used to vary the meaning of the enacting part of the statute if the latter is plain and unambiguous. *Lafayette Ben. Soc. v. Lewis*, 7 O. pt. 1, p. 80; *Wachendorf v. Shaver*, 149 Ohio St. 231. No ambiguity is cited by the prosecution, nor does the language of the section justify such a finding. Section 2913.61(C), through the employment of clear and unambiguous language, established two standards when a series of theft offenses under Section 2913.02 are committed while the offender occupies the same employment, capacity or relationship to another:

First – ". . . all such offenses shall be tried as a single offense . . ."

AND

Second – "the value of the property or services involved . . . is the aggregate value of all property and services involved in all offenses of the series . . ."

These two standards are clear and unambiguous, therefore, no resort to the title of the statute to limit the intent of the substantive enactment is proper. *Simpkenson v. Board of Public Works,* 9 Ohio Dec. Rep. 453.

THIRD, the prosecution contends that Criminal Rule 8(A) permits such a joinder of offenses. This argument is of no help because it assumes the existence of several offenses when the issue presented on appeal is whether Section 2913.61(C), under the circumstances of this case, restricts the prosecution to one offense. If the section applies then "all such offenses shall be tried as a single offense." Therefore, the issue of joinder is not presented.

FOURTH, the state implies that the proper relief for those multiple counts, if any, may be found in the multiple counts section of 2941.25, Revised Code. Once again, that provision offers no help for it applies only in cases where the Defendant has been convicted of several counts. The issue presented by this appeal is whether this case may be tried as one offense or several.

Furthermore, if Section 2941.25 is the justification for joinder of these multiple counts, notwithstanding the restrictions of Section 2913.61(C), there would be no occasion when the latter provision would apply. The prosecution could simply indict for all offenses, whether or not they meet the factual criteria of Section 2913.61(C), and

simply argue that the cure, if any, may be found in the multiple counts section. Of course, such a posture ignores the specific and unequivocal mandate of Section 2913.61 (C) that "all such offenses *shall be tried* as a *single* offense.

Having reviewed the objections advanced by the State of Ohio to the judgment of the trial court, a brief description of Petitioner's contention should be discussed. It should be apparent that any well reasoned conclusion must necessarily include an analysis of Section 2921.41 (A) (1), the Theft In Office Statute charged herein.

> (A) No public official or party official shall *commit any theft offense* when either of the following applied:
>
> (1) The offender uses his office, or permits, or assents to its use, in aid of committing the offense (emphasis added)."

Each of the counts of the indictment charges this specific statutory offense. Therefore, in order to prevail, the prosecution must allege and prove an underlying theft offense, i.e., that Defendant did "commit any theft offense". See Volume 1, SCHROEDER-KATZ, OHIO CRIMINAL LAW, *Analysis of the Elements of Crimes;* and *State v. Draggo,* 65 Ohio St. 2d 88, 91.

Recognizing this fact, and observing that the near identical wording of each count of the indictment may not be totally specific, Petitioner filed a Motion for Bill of Particulars, in order to learn what underlying theft offense was committed. In the motion, a request was made for the State to identify "what specific theft offense is the Defendant alleged to have committed". Although the state's response did not contain a numerical designation of the Revised Code Section, it did recite that his offense

was "the theft of monies belonging to this public hospital by writing the checks as listed in the aforementioned indictment . . ." A comparison of the cited language to the twenty-three (23) theft offenses included under Section 2913.01(K), Revised Code eliminates all but Section 2913.02, as the underlying theft offense upon which the prosecution relies to support its allegation of Theft In Office. *State v. Bernstein,* 25 Ohio L. Abs. 291.

The record of this case demonstrates, therefore, that the State is alleging that Petitioner committed forty-nine (49) separate theft offenses under Section 2913.02, Revised Code, all during a span of time wherein he was the administrator of the hospital funds entrusted to him, and these offenses constitute Theft in Office because they further allege that Mr. Krutz was a public official. A comparison of this allegation to the language of Section 2913.61(C), and the accompanying committee comments, compels the same conclusion reached by the trial court and the Eleventh District Court of Appeals.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided December 19, 1986)

Case No. 86-110

THE SUPREME COURT OF OHIO
COLUMBUS

STATE OF OHIO,
Appellant,
vs.
ROBERT C. KRUTZ,
Appellee.

[28 Ohio St. 3d 36]

Criminal law—Theft in office—R.C. 2921.41—Each of a series of offenses may be prosecuted separately.

O.Jur 3d Criminal Law §§ 2015, 2362.

Theft in office offenses, as defined in R.C. 2921.41, are not "theft offenses" which must be tried as a single offense under R.C. 2913.61(C).

APPEAL from the Court of Appeals for Portage County.

Robert C. Krutz was the appointed administrator of Robinson Memorial Hospital, a county hospital, and, as such, was a public official. The hospital's board of trustees issued a VISA card to him as well as placed a hospital checking account under his control. On April 17, 1984, the Portage County Grand Jury indicted Krutz on forty-nine separate counts of theft in office in violation of R.C.

2921.41(A)(1).[1] On August 29, 1984, the Court of Commons Pleas of Portage County granted a defense motion requesting the prosecution to elect which of the forty-nine counts it was going to proceed upon and requesting the court to dismiss the remaining forty-eight counts. This action was affirmed by the court of appeals.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

HOLMES, J. The sole issue before us is whether a violation of R.C. 2921.41, theft in office, is a theft offense under R.C. 2913.02 subject to the requirement of R.C. 2913.61(C) to try all such offenses as a single offense. For the reasons which follow, we find that it is not and reverse the judgment below.

R.C. 2913.61(C) provides:

"When a series of offenses under section 2913.02 of the Revised Code is committed by the offender in his same employment capacity, or relationship to another, all such offenses shall be tried as a single offense, and the value of the property or services involved * * * is the aggregate value of all property and services involved in all offenses in the series. In prosecuting a single offense under this division, it is not necessary to separately allege and prove each offense in the series. It is sufficient to allege and prove that the offender, within a given span of time, committed one or more theft offenses in his same employment, capacity, or relationship to another."

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1. The indictments charged a separate count for each check drawn between October 14, 1981 and May 5, 1983 on a hospital account entitled the "Special Purpose Fund," used to make allegedly improper purchases such as cigarettes and a political fundraiser contribution ticket, and to pay VISA statements containing allegedly improper items such as a Hilton Head vacation with Krutz' girlfriend, flowers for Krutz' wife and daughter, and personal restaurant and hotel bills.

Our concern is what constitutes a "series of offenses under section 2913.02." R.C. 2913.02 simply defines "theft," *i.e.*, depriving an owner of property or services without the owner's consent.[2] That section makes no mention of the theft in office statute, R.C. 2921.41. However, appellee in effect argues that R.C. 2913.61 and 2913.02 must be read *in pari materia* with R.C. 2913.01(K)(1), which defines a theft offense as "[a] violation of section 2911.01 * * * or 2921.41 of the Revised Code." This argument ignores the fact that the *in pari materia* rule of statutory construction applies "only where the statute to be construed is ambiguous or the significance of its terms doubtful." *Morris v. Kaiser Engineers, Inc.* (1984), 14 Ohio St. 3d 45, 47, citing *State v. Fremont Lodge of Loyal Order*

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2. R.C. 2913.02 provides in full:

"(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

"(1) Without the consent of the owner or person authorized to give consent;

"(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

"(3) By deception;

"(4) By threat.

"(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than three hundred dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is three hundred dollars or more and is less than five thousand dollars, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, a violation of this section is theft, a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more, or if the offender has previously been convicted of two or more theft offenses, a violation of this section is grand theft, a felony of the third degree. If the property stolen is a motor vehicle, as defined in section 4501.01 of the Revised Code, * * * a violation of this section is grand theft of a motor vehicle * * *, a felony of the third degree."

of Moose (1949), 151 Ohio St. 19 [38 O.O. 506], paragraph nine of the syllabus. Courts do not have the authority to ignore the plain and unambiguous language in a statute in the guise of statutory interpretation, *Bd. of Edn. v. Fulton Cty. Budget Comm.* (1975), 41 Ohio St. 2d 147, 156 [70 O.O.2d 300], especially when application of the rule of construction would be contrary to the clearly manifested intent of the legislature, *Fremont Lodge, supra*, at paragraph nine of the syllabus; *Volan v. Keller* (1969), 20 Ohio App. 2d 204, 206 [49 O.O.2d 286].

A reading of R.C. 2913.61(C) clearly indicates that only offenses under R.C. 2913.02 must be tried together when committed in the same employment, capacity, or relationship to another; the statute does not say "all theft offenses," but merely "* * * a series of offenses under section 2913.02." In addition to the plain language of R.C. 2913.61(C), it is clear that any interpretation requiring the phrase "offenses under section 2913.02" to include violations of R.C. 2921.41, theft in office, would be contrary to the clearly manifested intent of the legislature, prohibited by *Fremont Lodge, supra.*

It is clear that R.C. Chapter 2913 proscribes theft and fraud offenses, while R.C. Chapter 2921 addresses offenses of public officials which tend to subvert the processes of democratic government. See Committee Comment to Am. Sub. H.B. No. 511. The Committee Comment to R.C. Chapter 2913 and R.C. 2913.61, respectively, specify that the chapter addresses "the basic theft offense" and the statute merely contains "rules for prosecuting as a single offense a series of theft offenses amounting to embezzlement, and gives detailed criteria for determining the value of stolen property or services" when value is an element. Although value is not always an element of violations of R.C. 2913.02, *i.e.*, when there is a theft and one or more prior

theft offenses, value is never an element of violations of R.C. 2921.41. Any theft in office, no matter how small the value of the item stolen, is a third-degree felony, subject to the punishment applicable to third-degree felonies.

R.C. Chapter 2921 also has two additional requirements not found in R.C. Chapter 2913: (1) that the thief be a public official and (2) that he use his office to commit or facilitate commission of that theft or that the property or services involved be owned by the government. R.C. 2921.41(A). Thus, while thievery is regulated by both chapters, R.C. Chapter 2921 adds these requirements in order to serve a separate purpose—more stringent punishment of, and protection of the public from, those who abuse and corrupt public offices.[3]

In sum, we feel there is no need to read R.C. 2913.02, 2913.61(C), and 2921.41 *in pari materia* due to the unambiguous language of R.C. 2913.61(C). In enacting R.C. 2921.41, the Ohio General Assembly expressed the intent that theft in office by a public official or party official is of great public concern and to be dealt with separately. Additionally, the rule of statutory construction in which the specific or special statute controls over a general statutory provision covering the same and other subjects in general terms, *State, ex rel. Kerns, v. Rindsfoos* (1954), 161 Ohio St. 60, 66 [53 O.O. 2], would require the "public official theft" to be dealt with under R.C. 2921.41 rather than under the general thief provisions of R.C. 2913.02 and 2913.61(C). Accordingly, theft in office offenses, as

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3. R.C. 2921.41 provides in part:

"(B) Whoever violates this section is guilty of theft in office, a felony of the third degree.

"(C)(1) A public official or party official who is convicted of, or pleads guilty to, theft in office is forever disqualified from holding any public office, employment, or position of trust in this state."

defined in R.C. 2921.41, are not "theft offenses" which must be tried as a single offense under R.C. 2913.61(C).

Appellee argues that the phrase "offenses committed under section 2913.02" in R.C. 2913.61(C) means all theft offenses committed, whether or not charged in the indictment. We take this argument to mean that the state should not be allowed to charge a "non-R.C. 2913.02" offense in an indictment as a subterfuge to escape the mandate of R.C. 2913.61(C) to try a series of R.C. 2913.02 offenses as one offense. Our response to such an argument is that R.C. 2921.41 offenses, as we previously stated, require the establishment of more elements than R.C. 2913.02 offenses require, and, where the evidence fails to establish such further elements—that the thief is a public official who either used his office to commit the offense or who stole government property—the provisions of R.C. 2913.61(C) may apply under the general rule that the charges must conform to the evidence.

Here, however, the evidence clearly establishes, and appellee does not dispute, that he was a public official who was issued a VISA card and was authorized to use a checking account in his official capacity. Thus, the indictment properly charged appellee with forty-nine counts of theft in office for allegedly making forty-nine unauthorized purchases with such card and checking account. The dismissal of forty-eight counts was contrary to law and the judgment of the court of appeals is reversed and the cause is remanded to the trial court for further proceedings in accordance with this opinion.

Judgment reversed
and cause remanded.

CELEBREZZE, *C.J.*, SWEENEY, LOCHER, C. BROWN, DOUGLASS, and WRIGHT, *JJ.*, concur.

OPINION OF THE ELEVENTH DISTRICT COURT OF APPEALS

(Filed November 25, 1985)

Case No. 1511

COURT OF APPEALS

ELEVENTH DISTRICT
PORTAGE COUNTY

STATE OF OHIO,
Plaintiff-Appellant,

vs.

ROBERT C. KRUTZ,
Defendant-Appellee.

OPINION

JUDGMENT: AFFIRMED.

DAHLING, *P.J.*

This is an appeal from the Court of Common Pleas, Portage County, Ohio. Robert Krutz was the administrator at Robinson Memorial Hospital. He was indicted by the Portage County Grand Jury on 49 counts of violations of R.C. 2921.41(A)(1), theft in office.

Apparently defendant had used a Visa card which was in the hospital's name for personal use and then wrote checks from the hospital special fund to pay the Visa bills.

Defendant entered pleas of not guilty and requested a Bill of Particulars from the State. After receiving the Bill of Particulars from the State, defendant moved

the court pursuant to R.C. 2913.61(C) to merge the 49 counts into one count. After hearing arguments on the matter, the trial court merged the indictments into one count and it is from that order which the State is now appealing.

ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED ERROR WHEN IT RULED IN FAVOR OF DEFENDANT-APPELLEE'S MOTION FOR THE STATE TO ELECT WHICH OF THE FORTY-NINE (49) COUNTS OF THEFT IN OFFICE IT WOULD PROCEED UPON AND FOR THE COURT TO DISMISS THE REMAINING COUNTS.

This assignment of error is without merit. The indictment was properly merged to one offense instead of forty-nine.

R.C. 2913.61(C) states:

"When a series of offenses under Section 2913.02 of the Revised Code is committed by the offender in his same employment, capacity, or relationship to another, all such offenses shall be tried as a single offense * * * In prosecuting a single offense under this division, it is not necessary to separately allege and prove each offense in the series. It is sufficient to allege and prove that the offender, within a given span of time, committed one or more theft offenses in his same employment, capacity, or relationship to another."

R.C. 2913.01(K) indicates what sections of R.C. 2911, 2913, 2915 and 2921 are to be considered as theft offenses.

R.C. 2913.01(K) specifically refers to R.C. 2921.41 (A)(1), Theft in Office. R.C. 2913.01(K) states:

"(K) 'Theft offense' means any of the following:

(1) A violation of section 2911.01, * * * or 2921.41 of the Revised Code;"

50 Ohio Jurisprudence 2d 189, Statutes, §216, states:

"It is a fundamental rule of statutory construction that sections and acts in pari materia, that is, 'in relation to the same matter, subject or object,' should be construed together. * * *"

Thus, when construed in this manner, R.C. 2913.01(K) provides the means for R.C. 2921.41(A)(1) to be considered as a theft offense for purposes of R.C. 2913.61(C). This section brings this theft offense under R.C. 2913.61(C) by virtue of this statutory construction. The language of this code section is clear and serves as the authority for the court's ruling.

Each count charges the identical violation of R.C. 2921.41(A)(1). The factual elements of each count are as follows:

1. ROBERT C. KRUTZ did
2. On or about the (*date*),
3. At the County of Portage
4. Being a public official
5. Use his office in aid of committing a theft offense, to-wit:
6. The theft of monies belonging to Robinson Memorial Hospital

7. By writing a check Number (*number*) drawn on the Robinson Memorial Hospital Special Purpose Fund,

8. For (*item(s) purchased*).

Each of the forty-nine (49) are identical except for the date of the offense, the check number, and the items purchased. Defendant filed a Motion for Bill of Particulars requesting the State to identify "what specific theft offense is the defendant alleged to have committed." The State's response was: "The theft of monies belonging to this public hospital by writing the checks as listed in the aforementioned indictment."

The State alleges that theft offenses were committed and that they constitute theft in office. Accordingly, one offense and not forty-nine should have been charged.

28 O. Jur. 3d 563, Criminal Law, Section 2015, provides:

> "When a series of offenses under the statute defining the offense of theft is committed by the offender in his same employment, capacity, or relationship to another, all such offenses shall be tried as a single offense, and the value of the property or services involved for the purpose of determining the value as required by statute, is the aggregate value of all property and services involved in all offenses in the series. In prosecuting a single offense, it is not necessary to separately allege and to prove each offense in the series. It is sufficient to allege and prove that the offender, within a given span of time, committed one or more theft offenses in his same employment, capacity, or relationship to another."

In conclusion, the clear language of R.C. 2913.61(C) was properly applied by the trial court.

Judgment affirmed.

/s/ ALFRED E. DAHLING
Presiding Judge

FORD, *J.*, Concurs;
COOK, *J.*, Dissents with Dissenting Opinion

DISSENTING OPINION

COOK, *J.*

I respectfully dissent from the majority opinion.

In the instant cause, the trial court merged forty-nine counts of an indictment, each count charging appellee with a violation of R.C. 2921.41(A)(1), theft in office, to one count of said offense. Such action by the trial court was predicated on R.C. 2913.61(C) which provides:

> "(C) *When a series of offenses under section 2913.02 of the Revised Code is committed by the offender in his same employment, capacity, or relationship to another, all such offenses shall be tried as a single offense,* and the value of the property or service involved for the purpose of determining the value as required by division (A) of this section, is the aggregate value of all property and services involved in all offenses in the series. In prosecuting a single offense under this division, it is not necessary to separately allege and prove each offense in the series. It is sufficient to allege and prove that the offender, within a given span of time, committed one or more theft offenses in his same employment, capacity, or relationship to another."

In my opinion, the trial court erred in merging the forty-nine counts of the indictment into one count. Under R.C. 2913.61(C), such action by the trial court can only be taken "when series of offenses under section 2913.02 of the Revised Code is committed by the offender * * *." In the instant cause, appellant was not charged under R.C. 2913.02 in any count but under R.C. 2921.41(A)(1) in all counts of the indictment.

In my opinion, R.C. 2913.61(C) does not apply where the offenses charged are under any statute other than R.C. 2913.02.

I would reverse the judgment of the trial court.

/s/ ROBERT E. COOK
Judge

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed August 29, 1984)

Case No. 84 CR 0048

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

v.

ROBERT KRUTZ,
Defendant.

This matter came on for hearing on the Defendant's Motion to Dismiss and Elect with reference to the counts in the indictment. The defendant stands charged with 49 separate counts of theft in office as defined by Revised Code Section 2921.41.

The State must prove the date, the venue, that he was a public official, and that there was a theft. The term theft has been defined in Revised Code Section 2913.01 (K), which says theft means any of the following: A violation of Section . . . 2921.41 . . . of the Revised Code.

In reviewing this indictment one must look to Revised Code Section 2913.61, specifically paragraph C, which reads in part as follows: "When a series of offenses under Section 2913.02 of the Revised Code is committed by the offender in the same employment, capacity, or relation-

ship to another, all such offenses shall be tried as a single offense . . ."

It is therefore abundantly clear that the crime charged is a theft offense. It is further clear that there should be but one indictment alleging theft in office over a period of years and, therefore, this indictment must be merged into one count. SO ORDERED.

/s/ GEORGE E. MARTIN
Judge

Supreme Court, U.S.
FILED
APR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1288

In the Supreme Court of the United States

October Term, 1986

ROBERT C. KRUTZ,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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18pp

QUESTION PRESENTED

May Petitioner request this Court to issue a Writ of Certiorari to a state supreme court when that court's decision was based solely on statutory construction of Ohio law and Petitioner never raised a federal question in any of the state court proceedings, and further where the decision of that court clearly does not infringe upon the Petitioner's due process rights to a fair trial.

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No. 86-1288

In the Supreme Court of the United States

October Term, 1986

ROBERT C. KRUTZ,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States.

The Respondent, State of Ohio, respectfully requests that this Court deny Petitioner's prayer that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio entered on December 19, 1986.

OPINIONS BELOW

Petitioner was indicted on 49 counts of Theft in Office. Before trial, Petitioner filed a motion to dismiss 48 of the counts. The trial Court granted the motion and consolidated all 49 counts into one. This ruling appears in the Petitioner's Appendix at p. A14.

On appeal by the State, the decision was affirmed by a vote of 2-1 by the Appellate Court. This decision, along with the dissenting opinion of Judge Cook, is unreported and appears in the Petitioner's Appendix at p. A7.

The Supreme Court of Ohio, on December 19, 1986, in *State v. Krutz,* 28 Ohio St. 3d 36 (1986), unanimously reversed, reinstating all 49 counts. No petition for rehearing was filed. A copy of this decision appears in the Petitioner's Appendix at p. A1.

On February 24, 1987, Respondent requested and was granted an extension allowing the State to file its Brief in Opposition to Petition for Writ of Certiorari by April 3, 1987.

JURISDICTION

This Court does not have jurisdiction to review Petitioner's request since the Ohio Supreme Court ruling was not based on a federal question as required by 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

Although Petitioner claims that his rights under the Fourteenth Amendment to the U.S. Constitution were violated, he never raised this issue in the State courts and he has wholly failed to demonstrate such abridgement in his Petition.

STATEMENT OF THE CASE

Robinson Memorial Hospital is a County hospital located in Ravenna, Ohio. Defendant, Robert Krutz, hereinafter referred to as Petitioner, was the appointed administrator of this hospital, and as such a public official.

In connection with his duties as administrator, the Hospital Board of Trustees had given Petitioner permission to obtain and use a VISA card for his expenses incurred in connection with hospital business only. Although Petitioner was supposed to obtain approval of his expenses each month from the Board, he did not do so. Instead, he used a hospital checking account, over which he had exclusive control, to pay the monthly VISA bills.

Over a period of a few years, Petitioner used his VISA card for many personal items not connected with hospital business. He took vacations with his girl friend to Hilton Head, North Carolina; purchased a watch for himself and a ticket to a political fundraiser which he attended; sent flowers to his wife and daughter on their birthdays; bought dinner for himself and his girl friend at numerous restaurants in Northeast Ohio; and even used it to pay a hotel bill at the Aurora Sheraton for his stay there while he was separated from his wife. He would also send his assistant to a nearby store to purchase beer and cigarettes

for his own consumption. The assistant used cash to purchase the items from the store and Petitioner reimbursed him with checks from the same hospital checking account that he used to pay the VISA card bills.

On April 17, 1984, the Portage County Grand Jury indicted Petitioner on 49 separate counts of Theft in Office under Ohio Revised Code Section 2921.41 (A)(1). Petitioner entered a plea of not guilty. The Court of Common Pleas of Portage County set the case for a jury trial in July of 1984, which was later continued until September 11, 1984.

On July 12, 1984, Petitioner filed a Motion to Dismiss 48 counts and also requested the prosecution to elect which of the 49 counts it was going to proceed upon. Respondent, the State of Ohio, hereinafter referred to as the State, filed a Motion in Opposition to Defendant's Motion to Dismiss on August 3, 1984. The motions were entertained and the judgment entry, which was adverse to the State, was journalized on August 29, 1984. Citing Ohio Revised Code Section 2913.61, *Value of Property,* Subsection (C), as authority, the Trial Court merged all 49 counts into one count, thereby dismissing 48 counts. Thereafter, before the start of the trial, the State filed a timely Notice of Appeal to the Court of Appeals, Eleventh Appellate District. On November 25, 1985, the Court of Appeals, in a 2-1 decision, with Judge Robert Cook writing a dissenting opinion, affirmed the Trial Court's decision.

The State filed a timely Notice of Appeal with the Supreme Court of Ohio on December 23, 1985. Leave to Appeal was thereafter granted by the Ohio Supreme Court on March 12, 1986. On December 19, 1986, the Ohio Supreme Court unanimously reversed both the Trial Court and Appellate Court decisions, holding that Ohio

Revised Code Section 2913.61 only required merger of theft offenses committed in violation of Ohio Revised Code Section 2913.02.

At no time in any of the State Court proceedings did Petitioner ever raise a federal question. His first reference to the U.S. Constitution appears in this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Where a state court combines its principles of statutory construction with the expressed intent of the state legislature to determine the applicability of a state statute, and neither the constitutional validity nor application of that statute is raised in the state court, no federal question for which the United States Supreme Court will exercise jurisdiction exists.

ARGUMENT

This case does not raise any questions reviewable by this Court. The only issue presented to the State Trial Court, Appellate Court and Supreme Court was the proper construction of a state statute, Ohio Revised Code Section 2913.61 (C), *Value of Stolen Property*. That section states in relevant part:

> When a series of offenses *under Section 2913.02* of the Revised Code is committed by the offender in his same employment, capacity, or relationship to another, all such offenses shall be tried as a single offense, and the value of the property or services involved *for the purpose of determining the value* as required by division (A) of this section, is the aggregate value of

> all property and services involved in all offenses in the series. (Emphasis added).

It is clear that this section only requires consolidation into one charge of theft offenses committed in violation of Ohio Revised Code Section 2913.02, *Theft,* the general theft offense section. *State v. Krutz,* 28 Ohio St. 3d 36 (1986). Petitioner claimed that the 49 counts of Theft in Office, in violation of a different chapter and section of the Ohio Revised Code, namely Section 2921.41 (A)(1), must be tried as one offense pursuant to Section 2913.61 (C). Ohio Revised Code Section 2921.41 (A)(1) reads as follows:

> § 2921.41 Theft in office.
>
> (A) No public official or party official shall commit any theft offense, when either of the following applies:
>
> (1) The offender uses his office, or permits, or assents to its use, in aid of committing the offense;

The Ohio Supreme Court looked to its well settled state law and applied its rule of statutory construction that the plain and unambiguous language of a statute would not be ignored,

> especially when application of the rule of construction would be contrary to the clearly manifested intent of the legislature. *Krutz, supra* at 38.

The Court went on to say that

> [a] reading of Revised Code Section 2913.61 (C) clearly indicates that only offenses under Revised Code 2913.02 must be tried together when committed in the same employment, capacity, or relationship to another; the statute does not say "all theft offenses," but merely ". . . a series of offenses under Section

> 2913.02." In addition to the plain language of Revised Code 2913.61 (C), it is clear that any interpretation requiring the phrase "offenses under Section 2913.02" to include violations of Revised Code 2921.41, theft in office, would be contrary to the clearly manifested intent of the legislature. . . . *Id.*

The decision of the Ohio Supreme Court also noted that Chapter 2913 proscribes theft and fraud offenses, while Chapter 2921 addresses offenses committed by public officials which tend to subvert the processes of a democratic government. The Committee Comments to Ohio Revised Code Section 2913.61 and Chapter 2913 in general, specify that Chapter 2913 addresses "the basic theft offense" and Section 2913.61 merely contains rules for combining a series of offenses and gives detailed criteria for determining the value of the stolen property *when value is an element. Krutz, supra* at 38.

> Although value is not always an element of violations of Revised Code 2913.02, *i.e.,* when there is a theft and one or more prior theft offenses, *value is never an element of violations of Revised Code 2921.41.* Any theft in office, no matter how small the value of the item stolen, is a third-degree felony. *Id.* (Emphasis added).

The Court continued its analysis of the differences between the two sections by indicating that

> R.C. Chapter 2921 . . . has two additional requirements not found in R.C. Chapter 2913: (1) that the thief be a public official and (2) that he use his office to commit or facilitate commission of that theft or that the property . . . involved be owned by the government. *Id.*

It concluded by saying that

> while thievery is regulated by both chapters, R.C. Chapter 2921 adds these requirements in order to serve a separate purpose—more stringent punishment of, and protection of the public from, those who abuse and corrupt public offices. *Id.* at 38-39.

The Court reasoned that the language of Ohio Revised Code Section 2913.61 (C) was clear and unambiguous. It further found that the legislative intent was to deal with theft in office separately since it is of great public concern and held that theft in office offenses are not "theft offenses" and need *not* be tried as a single offense as claimed by Petitioner. It is obvious from a review of the above that a question of the state law was passed on solely by the application of state law.

Petitioner's argument before this Court is almost a verbatim reproduction of his brief presented to the Ohio Supreme Court, and as such, provides this Court with all that Petitioner presented to the State Courts. The State's position, like the decision of the Ohio Supreme Court, focused solely on the construction of the statute in question. It is not the function of the United States Supreme Court on reviewing a decision of the state's highest court to construe a state statute contrary to the construction given by the highest court of the state. *See Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978).

More importantly, however, the threshold requirement that there be presented a federal question for the Court's review has not been met by Petitioner. The Supreme Court's jurisdiction to review a state court decision under 28 U.S.C. Section 1257 is dependent upon the presence of a federal question in the case. *St. Louis, I.M. FS. Railway Co. v. Taylor,* 210 U.S. 281 (1908); *Palmer*

Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952). Furthermore, it is a necessary requirement for review on certiorari that the federal question, if there is one, be expressly decided by the state court or that, by implication, the judgment could not have been made without deciding the federal question. *First National Bank v. Estherville*, 215 U.S. 341 (1910); *Webb v. Webb*, 451 U.S. 493 (1981).

A state court's refusal to read more into a statute than is readily apparent from the plain language of that statute, does not implicate federal constitutional rights when neither its federal constitutional validity or application is put in issue. The State Supreme Court correctly held that the clear reference to *only* Ohio Revised Code Section 2913.02 as the applicable theft offenses for which a series of some are to be consolidated under Section 2913.61 (C) meant *only* those theft offenses in Section 2913.02. It held nothing more, as that was the sole question before it.

The record discloses no claim under a federal statute or the United States Constitution presented in the state courts. Additionally, there is nothing clearly shown in the record to indicate that the courts were apprised of the nature or substance of the federal claim at the time and manner required by law. The phrase "Due Process" was never used, no reference was made to federal constitutional rights under the Fourteenth Amendment, no federal supreme court case law was relied on and the State Supreme Court used no language to suggest in any way that it ruled on a federal issue. In fact, the State Court articulated an independent state ground with sufficient clarity. These points are amply demonstrated in the petition before this Court. Under such circumstances, the petition for certiorari should be dismissed as jurisdiction is plainly

lacking. *Webb v. Webb, supra; Oliver v. United States,* 466 U.S. 170 (1984).

Petitioner hints at a federal equal protection claim; however, Respondent advances two arguments which it believes precludes the Court from considering this issue. First, Petitioner's subtle suggestion of an equal protection violation in the body of his petition without more is not sufficient for the Court to invoke its jurisdiction over the matter. Under the provisions of Supreme Court Rule 21.1 (a) and pursuant to its many consistent holdings, this Honorable Court has declared that it will not consider an issue if it is not fairly comprised in the statement of the questions presented by the petition for certiorari. *United States v. Penn Foundry & Mfg. Co.,* 337 U.S. 198 (1949); *Andrew v. Louisville & Nashville Railroad Co.,* 406 U.S. 320 (1972); *United States v. Leon,* 468 U.S. 897 (1984).

Second, if the issue of equal protection can be said to have been before the State Court, however subtly, that question was disposed of by the application of state law and what the State Court decided was the intent of its own legislature. The Ohio Supreme Court's adequate and independent state ground for its decision bars further review in the Supreme Court. *Bell v. Maryland,* 378 U.S. 226 (1964); *Herb v. Pitcairn,* 324 U.S. 117 (1945). Furthermore, this Court has declined to pass on a constitutional challenge where a statute is susceptible of a construction by the state judiciary which might avoid in whole or part the necessity for federal constitutional adjudication. *H.L. v. Matheson,* 450 U.S. 398 (1981).

CONCLUSION

Applying principles of statutory construction with express legislative intent, the Ohio Supreme Court properly found that Ohio Revised Code Section 2913.61 (C) applies only to offenses under Ohio Revised Code Section 2913.02 and not to offenses committed under Ohio Revised Code Section 2921.41. Although Petitioner now alleges a federal question, the only legal issue involved in this case concerns the interpretation of state law. Petitioner has failed to specify in his petition at what stage of the state court proceedings he raised a federal question. The reason for this failure to comply with United States Supreme Court Rule 21.1 (a) is that the alleged federal question was not raised in the state trial court and was only raised, if at all, in a vague and unspecified manner before the state appellate courts. Therefore, the federal question, if any exists, was neither timely nor properly raised, thus, depriving this Court of jurisdiction.

Wherefore, Respondent respectfully requests that certiorari be denied.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

THEFT

§ 2913.02 Theft.

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat.

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than three hundred dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is three hundred dollars or more and is less than five thousand dollars, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, a violation of this section is theft, a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more, or if the offender has previously been convicted of two or more theft offenses, a violation of this section is grand theft, a felony of the third degree. If the property stolen is a motor vehicle, as defined in section 4501.01 of the

Revised Code, a violation of this section is grand theft of a motor vehicle, a felony of the third degree.

VALUE

§ 2913.61 Value of stolen property.

* * * * *

(C) When a series of offenses under section 2913.02 of the Revised Code is committed by the offender in his same employment, capacity, or relationship to another, all such offenses shall be tried as a single offense, and the value of the property or services involved for the purpose of determining the value as required by division (A) of this section, is the aggregate value of all property and services involved in all offenses in the series. In prosecuting a single offense under this division, it is not necessary to separately allege and prove each offense in the series. It is sufficient to allege and prove that the offender, within a given span of time, committed one or more theft offenses in his same employment, capacity, or relationship to another.

PECULATION AND DERELICTION

§ 2921.41 Theft in office.

(A) No public official or party official shall commit any theft offense, when either of the following applies:

(1) The offender uses his office, or permits, or assents to its use, in aid of committing the offense;

(2) The property or service involved is owned by this or any other state or the United States, a municipality, or any political subdivision, department, or agency of any of them, or by a political party, or is part of a political campaign fund.

(B) Whoever violates this section is guilty of theft in office, a felony of the third degree.